AHMAD ZUL-QARNAIN IBRAHIM v. WRP ASIA PACIFIC SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ADLIN ABDUL MAJID J
[CIVIL SUIT NO: WA-22NCC-68-02-2022]
31 JULY 2023

Abstract – *An auditor shall state in the auditors' report whether the financial statements of the company are properly drawn up so as to give a fair view of matters to be dealt with in the financial statement, in accordance with the Companies Act 2016 and in accordance with the applicable accounting standards. Where the auditor is of the opinion that the financial statements have not been drawn up in accordance with the applicable accounting standards, he is required to state, amongst others, whether in his opinion, if the financial statements had been drawn up in accordance with the approved accounting standards, they would have given a true and fair view of matters required to be dealt with in the financial statements.*

CIVIL PROCEDURE: *Striking out – Application for – Debt recovery action – Action by claimant against auditor – Allegations of conspiracy – Application by auditor to strike out action – Auditor provided qualified opinions on 'amounts due to directors' in financial statements – Whether auditor intentionally extinguished debt when providing qualified opinions – Whether auditor engaged in conspiracy to defraud claimant – Whether action obviously unsustainable – Whether fit and proper case for striking out – Rules of Court 2012, O. 18 r. 19(1)*

TORT: *Conspiracy – Conspiracy to defraud – Debt recovery action by claimant against auditor – Auditor provided qualified opinions on 'amounts due to directors' in financial statements – Whether auditor had intentionally extinguished debt when providing qualified opinions – Whether auditor engaged in conspiracy to defraud claimant – Whether tort of conspiracy established*

The plaintiff was the legal representative of his mother ('Puan Sri Hamidah'). The present claim by the plaintiff against the defendants arose from a debt allegedly owed to Puan Sri Hamidah. In 2003, the first defendant restructured its debt obligations amounting to RM197,000 to Standard Chartered Bank Malaysia Bhd ('SCBM') and Standard Chartered Bank Offshore, Labuan ('SCBL'). The debt restructuring exercise involved the cancellation of the first defendant's debts to SCBM while the debt owing to SCBL was purchased by entities related to Ashmore Investment Management Limited ('Ashmore') and restructured as a debt of USD14,105,263. Harvest Asset Invest Ltd ('HAIL') was subsequently incorporated by the plaintiff's

father to purchase the first defendant's debt from Ashmore. HAIL acquired the debt of USD14,105,263 from Ashmore, through a debt restructuring agreement between HAIL and the first defendant. This involved a debt of RM75,208,636. Following the financing facility provided by TAEL Partners Ltd ('TAEL'), pursuant to facility agreements, the terms of the debt and repayment obligations with HAIL were restructured by way of an agreement between the first defendant and HAIL with the indebtedness reduced to RM18,405,272.89. Simultaneously, Puan Sri Hamidah, one Dato' Lee, who was a director of the first defendant, and HAIL executed a debt repayment agreement. In the agreement: (i) HAIL acknowledged that Puan Sri Hamidah and Dato' Lee advanced monies to Hail for investment purposes; (ii) the amount owed by HAIL to Puan Sri Hamidah was acknowledged to be RM12,071,770.50 and to Dato' Lee, RM6,333,502.39; and (iii) HAIL agreed to pay the debt with interest, based on a schedule of payments. It was the plaintiff's case that there was an outstanding balance of RM6,145,000 of the debt (excluding interest), which was due and owing to Puan Sri Hamidah ('PSH debt'). The second defendant was engaged as the auditor of the first defendant. In the auditors' report of the first defendant for the financial years ended 2018, 2019, 2020 and 2021, the second defendant provided qualified opinions on the 'amounts due to directors' in the financial statements. The plaintiff's case was that, in providing these qualified opinions, the second defendant had intentionally extinguished the PSH debt. Hence, the present action for the recovery of the PSH debt. The plaintiff's cause of action against the defendants was for conspiracy to defraud. The second defendant applied to strike out the plaintiff's claim, pursuant to O. 18 r. 19(1) of the Rules of Court 2012 ('ROC').

Held (allowing striking out application):

(1) A closer look at the first defendant's financial statements for financial years ended 2018, 2019, 2020 and 2021 would reveal that the item 'amount due to directors' was provided for under the item 'current liabilities'. In the second defendant's affidavit in support of the striking out application, the second defendant explained that the qualified opinions were not provided with the relevant documents or information from the directors of the first defendant. This explanation was consistent with the first defendant's allegation that documents were removed from the premises of the first defendant by Dato' Lee. The first defendant also confirmed that the board of the first defendant still did not have full records and/or knowledge of the affairs and transactions entered into by the first defendant while under the control of Dato' Lee. The second defendant also explained that the item 'fixed deposits belonging to two directors and a person connected to the directors', which had previously appeared in the financial statements between 2010 to 2017, was

removed, as the second defendant was unable to establish that the fixed deposits belonged to directors of the first defendant. From the audit responses of the first defendant's bank, Ambank (M) Berhad, there was no indication that the fixed deposits with the bank belonged to directors of the first defendant, including Puan Sri Hamidah. This justified the removal of the item 'fixed deposits belonging to two directors and a person connected to the directors' from the financial statements. Having considered the bases for the qualified opinions and the justifications provided by the second defendant to qualify its opinions, it could not be seen how the provision of the qualified opinions by the second defendant could amount to an act of conspiracy. In making the qualified opinions, the second defendant was acting in accordance with its statutory obligations under s. 266 of the Companies Act 2016. There was no evidence of the second defendant acting in concert with other defendants, resulting in an agreement with the predominant purpose of injuring the plaintiff. (paras 36, 43-45 & 47)

(2) There was no reasonable cause of action against the second defendant. The plaintiff's action against the defendant was obviously unsustainable and this was a fit and proper case for the striking out of the plaintiff's claim against the second defendant. (para 49)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal [2016] 3 CLJ 676 CA ***(refd)***

Legislation referred to:

Companies Act 2016, s. 266(2)(a), (b), (3)
Rules of Court 2012, O. 18 r. 19(1)

For the plaintiff - Gideon Tan & Yip Man Fei; M/s Gideon Tan Razali Zaini
For the 2nd defendant - Ben Chan & Sangeetha Vasanth Kumar; M/s Ben Chan

Reported by Najib Tamby

JUDGMENT

Adlin Abdul Majid J:

Introduction

[1] The second defendant filed an application to strike out the writ of summons and statement of claim against it ("striking out application").

[2] I allowed the striking out application, and provided brief reasons for my decision. These are the full grounds of my decision.

A **Background Facts**

The Parties

[3] The plaintiff is the legal representative of his mother, Dato' Puan Sri Hamidah Abdullah ("Puan Sri Hamidah").

B **[4]** The first defendant is a company principally involved in the business of manufacturing and marketing of disposal gloves, urological catheters and other related products and services.

[5] The second defendant is an audit, tax and advisory firm.

C **[6]** The first defendant was initially substantially owned by the plaintiff's father, Tan Sri Ibrahim Mohamed ("Tan Sri Ibrahim") and the plaintiff's family. However, in 2013, the plaintiff's family divested their shareholding in the first defendant.

[7] TAEL Partners Ltd ("TAEL Partners") invested and acquired shares
D in the first defendant by providing a financing facility to the first defendant in the sum of RM50,000,000, *via* facility agreements executed in October 2013 ("WRP-TAEL agreements").

[8] Following the investment, the third defendant, a director of TAEL Partners, was appointed as a director of the first defendant.

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History Of The Debt

[9] The plaintiff's claim against the defendants arises from a debt allegedly owed to Puan Sri Hamidah.

F **[10]** The facts leading to the alleged debt are complicated.

[11] In 2003, the first defendant restructured its debt obligations amounting to RM197,000,000 to Standard Chartered Bank Malaysia Berhad ("SCBM") and Standard Chartered Bank Offshore, Labuan ("SCBL"). The debt restructuring exercise involved the cancellation of the first defendant's debts
G to SCBM, while the debt owing to SCBL was purchased by entities related to Ashmore Investment Management Limited ("Ashmore"), and restructured as a debt of USD14,105,263.

[12] Harvest Asset Invest Ltd ("HAIL") was subsequently incorporated by Tan Sri Ibrahim to purchase the first defendant's debt from Ashmore. HAIL
H acquired the debt of USD14,105,263 from Ashmore, through a debt restructuring agreement dated 29 June 2010 between HAIL and the first defendant. This involved a debt of RM75,208,636.

[13] Following the financing facility provided by TAEL pursuant to the WRP-TAEL agreements, the terms of the debt and repayment obligations
I with HAIL were restructured by way of an agreement dated 2 June 2014 between the first defendant and HAIL, with the indebtedness reduced to RM18,405,272.89.

[14] Simultaneously, Puan Sri Hamidah, Dato' Lee Son Hong (who was a director of the first defendant) ("Dato' Lee") and HAIL executed a debt repayment agreement dated 2 June 2014. In the agreement:

(i) HAIL acknowledged that Puan Sri Hamidah and Dato' Lee advanced monies to HAIL for investment purposes;

(ii) the amount owed by HAIL to Puan Sri Hamidah was acknowledged to be RM12,071,770.50 and to Dato' Lee, RM6,333,502.39; and

(iii) HAIL agreed to pay the debt with interest, based on a schedule of payments.

[15] The plaintiff claimed that in memorandums dated 26 April 2016 and 26 September 2016, the first defendant acknowledged the debt and the first defendant's obligation to repay the debt.

The Plaintiff's Claim

[16] It is the plaintiff's case that there is an outstanding balance of RM6,145,000 of the debt (excluding interest), which is due and owing to Puan Sri Hamidah ("PSH debt"). This action is filed to recover the PSH debt.

[17] The plaintiff claimed that the defendants have full knowledge of the PSH debt, but failed to acknowledge the debt. As such, the plaintiff alleged that the defendants had, by their conduct, unlawfully and/or fraudulently conspired to cheat or defraud the plaintiff of the PSH debt.

The Striking Out Application

[18] The second defendant filed the striking out application pursuant to O. 18 r. 19(1) of the Rules of Court 2012 ("ROC"), to strike out the plaintiff's claim against it.

[19] It must be noted that the first and third defendants also filed applications to strike out the plaintiff's claim against them. However, I found that the nature of the plaintiff's claim against the first and third defendants, with allegations of conspiracy to defraud, necessitates a full trial of this action. I also found that the questions of whether the PSH debt was acknowledged by the first defendant, the knowledge and role of the third defendant and whether the debt was paid by the first defendant, are issues that can only be determined at the full trial of this matter. As such, I dismissed the first and third defendants' application to strike out the plaintiff's claim against them.

[20] However, I took a different view in relation to the claim against the second defendant. I found the claim against the second defendant to be obviously unsustainable, and I allowed the striking out application.

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Consideration And Findings

The Plaintiff's Claim Against The Second Defendant

[21] The plaintiff's cause of action against the defendants is for conspiracy to defraud. It is the plaintiff's case that the defendants had conspired to cheat
B or defraud the plaintiff of the PSH debt.

[22] Specifically as against the second defendant, the plaintiff claimed that the PSH debt, described as an "amount due to directors" and/or "fixed deposits belonging to two directors and a person connected to the directors" had appeared in the "statement of financial position" ("financial statement")
C of the first defendant between 2010 to 2017, which were filed by the previous auditors of the first defendant.

[23] The plaintiff claimed that the second defendant had intentionally extinguished the PSH debt. The second defendant was alleged to have done so by providing qualified opinions on the "amount due to directors" in the
D financial statements in 2018, 2019, 2020 and 2021.

[24] Thus, the question arising is whether in giving the qualified opinions, the second defendant committed an act of conspiracy against the plaintiff.

The Duties And Obligations Of The Second Defendant

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[25] To address this question, I will first consider the duties and obligations of the second defendant in the provision of the "independent auditors' report to the members of WRP Asia Pacific Sdn Bhd" ("auditors' report").

[26] The second defendant was engaged as auditors of the first defendant,
F by way of a letter of engagement dated 14 July 2022 ("letter of engagement"), issued by the second defendant to the first defendant. The letter of engagement provides that the objectives of the audit are to "... obtain reasonable assurance about whether the financial statements as a whole are free from material misstatement, whether due to fraud or error, and to issue an auditors' report that includes our opinion ..."
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[27] The letter of engagement also sets out the responsibilities of the second defendant as auditors of the first defendant. Paragraph 2(a) provides that the second defendant is required to examine the financial statements and report on whether they have been properly drawn up in accordance with approved
H accounting standards.

[28] Paragraph 2 then goes on to state:

> (b) Where, in our opinion, the financial statements have not been drawn up in accordance with a particular applicable approved accounting standard in Malaysia, we are required to state in accordance with the Act:

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(i) whether in our opinion, the financial statements would, if drawn up in accordance with that approved accounting standard In Malaysia, have given a true and fair view of the matters required by the Act to be dealt with in the financial statements;

(ii) whether in our opinion, the financial statements would not, if drawn up in accordance with that approved accounting standard in Malaysia, have given a true and fair view of the matters required by the Act and the reasons for holding that opinion;

(iii) if the Directors have given the particulars of the quantified financial effect, our opinion concerning the particulars; and

(iv) in a case to which neither subparagraph (ii) nor (iii) applies, particulars of the quantified financial effect on the financial statements of the failure to so draw up the financial statements.

(c) We are required by the Act to state in our auditors' report any defect or irregularity in the financial statements and any matter not set in the financial statements without regard to which a true and fair view of the matters dealt with by the financial statements would not be obtained.

[29] These responsibilities of the second defendant are consistent with the objectives of the audit, which are to provide the first defendant with reasonable assurance on whether the financial statements are free from material misstatements, and to issue the auditors' report. To this end, the second defendant must examine the financial statements in accordance with the approved standards.

[30] If the financial statements have not been drawn up in accordance with approved accounting standards, para. 2(b) of the letter of engagement requires the second defendant to state so.

[31] This requirement is consistent with s. 266 of the Companies Act 2016 ("CA 2016"), which sets out the powers and duties of auditors in the preparation of auditors' reports.

[32] Section 266(2)(a) provides that an auditor shall state in the auditors' report whether the financial statements of the company are in his opinion properly drawn up so as to give a fair view of matters to be dealt with in the financial statement, in accordance with the CA 2016 and in accordance with the applicable accounting standards. Section 266(2)(b) then goes on to address a scenario where the auditor is of the opinion that the financial statements have not been drawn up in accordance with applicable accounting standards. In such a case, the auditor is required to state, amongst others, whether in his opinion, if the financial statements had been drawn up in accordance with approved accounting standards, they would have given a true and fair view of matters required to be dealt with in the financial statements.

[33] Further, s. 266(3) of the CA 2016 provides that:

> (3) An auditor of a company shall have a duty to form an opinion to each of the following matters:
>
> (a) whether he has obtained all the information and explanations that he required;
>
> (b) whether proper accounting and other records, including registers, have been kept by the company as required by this Act ...

[34] The powers and duties imposed on auditors as set out in s. 266 of the CA 2016 are intended to ensure that companies' financial statements are prepared in accordance with the applicable accounting standards, and that auditors' reports would highlight any concerns arising from financial statements.

[35] The letter of engagement, and specifically para. 2, reflects these duties.

Qualified Opinions Provided By The First Defendant

[36] It is not in dispute that in the auditors' report of the first defendant for the financial years ended 2018, 2019, 2020 and 2021, the second defendant provided qualified opinions on the "amounts due to directors" in the financial statements.

[37] The plaintiff's case is that in providing these qualified opinions, the second defendant had intentionally extinguished the PSH debt.

[38] I am unable to agree that the PSH debt was extinguished. A closer look at the first defendant's financial statements for financial years ended 2018, 2019, 2020 and 2021 will reveal that the item "amount due to directors" is provided for under the item "current liabilities". The amounts are reflected as follows:

(i) for financial year ended 2018, RM6,109,669;

(ii) for financial year ended 2019, RM16,580,615;

(iii) for financial year ended 2020, RM15,969,881; and

(iv) for financial year ended 2021, RM15,969,881.

[39] Thus, it is clear that the PSH debt was not extinguished, but would have been set out in the "amount due to directors" under the item "current liabilities" in the first defendant's financial statements for the financial years ended 2018, 2019, 2020 and 2021.

[40] The second defendant did, however, provide qualified opinions of the "amount due to directors" in the financial statements. The basis of the qualified opinions is explained in each auditors' report:

(i) in the auditors' report for the financial year ended 2018, the basis of the qualified opinion is stated to be as follows:

> The company's amount due to directors carried at RM6,109,669 on the statement of financial position as at 30 June 2018 is unable to carry out audit procedures to verify the existence of the balances. We are unable to obtain sufficient appropriate audit evidence about the carrying amount of amount due to directors amounted to RM6,109,669. Consequently, we were unable to determine whether any adjustments to these amounts were necessary.

(ii) in the auditors' report for the financial year ended 2019, the basis of the qualified opinion is stated to be as follows:

> The Company's amount due to Directors and amount due to a related party carried at RM16,580,615 and RM700,000 respectively on the statement of financial position as at 30 June 2019 are unable to carry out audit procedures to verify the existence of the balances. We are unable to obtain sufficient appropriate audit evidence about the carrying amount due to directors amounted to RM16,580,615 and amount due to a related party amounted to RM700,000. Consequently, we were unable to determine whether any adjustments to these amounts were necessary.

(iii) in the auditors' report for the financial year ended 2020, the basis of the qualified opinion is stated to be as follows:

> The Company's amount due to Directors and amount due to a related party carried at RM15,969,881 and RM2,320,000 respectively on the statement of financial position as at 30 June 2020 are unable to carry out audit procedures to verify the existence of the balances. We are unable to obtain sufficient appropriate audit evidence about the carrying amount due to Directors amounted to RM15,969,881 and amount due to a related party amounted to RM2,320,000. Consequently, we were unable to determine whether any adjustments to these amounts were necessary.

(iv) in the auditors' report for the financial year ended 2021, the basis of the qualified opinion is stated to be as follows:

> The Company's amount due to Directors and amount due to a related party carried at RM15,969,881 and RM2,320,000 respectively on the statement of financial position as at 30 June 2021 are unable to carry out audit procedures to verify the existence of the balances. We are unable to obtain sufficient appropriate audit evidence about the carrying amount due to Directors amounted to RM15,969,881 and amount due to a related party amounted to RM2,320,000. Consequently, we were unable to determine whether any adjustments to these amounts were necessary.

[41] The bases of the qualified opinions were consistent every year, namely that the second defendant was unable to:

(i) carry out audit procedures to verify the existence of the "amount due to directors";

(ii) obtain sufficient appropriate audit evidence on the "amount due to directors"; and

(iii) determine whether any adjustments to these amounts are necessary.

[42] In the second defendant's affidavit in support of the striking out application, justifications for the qualifications were given. In particular, the second defendant explained that they were not provided with the relevant documents or information from the directors of the first defendant.

[43] This explanation is consistent with the first defendant's allegation that documents were removed from the premises of the first defendant by Dato' Lee, leading the first defendant to file a police report on 22 January 2020. The first defendant also confirmed that the board of the first defendant still does not have full records and/or knowledge of the affairs and transactions entered into by the first defendant while under the control of Dato' Lee.

[44] The second defendant also explained that the item "fixed deposits belonging to two directors and a person connected to the directors", which had previously appeared in the financial statements between 2010 to 2017 was removed, as the second defendant was unable to establish that the fixed deposits belonged to directors of the first defendant. From audit responses of the first defendant's bank, Ambank (M) Berhad, there was no indication that the fixed deposits with the bank belong to directors of the first defendant, including Puan Sri Hamidah. In my view, this justified the removal of the item "fixed deposits belonging to two directors and a person connected to the directors" from the financial statements.

[45] Having considered the bases for the qualified opinions and the justifications provided by the second defendant to qualify its opinions, I am unable to see how the provision of the qualified opinions by the second defendant could amount to an act of conspiracy. In making the qualified opinions, the second defendant was acting in accordance with its statutory obligations under s. 266 of the CA 2016.

The Elements Of Conspiracy

[46] For the plaintiff to succeed in a claim for conspiracy to cheat or defraud, the following requirements would need to be met:

(i) there must be an agreement or a combination of efforts between the defendants;

(ii) the predominant purpose of the agreement is to injure the plaintiffs;

(iii) acts had been done by the defendants in the execution of the agreement; and

(iv) the acts had resulted in damages to the plaintiff,

(see: *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676; [2016] 3 MLJ 797).

[47] It is clear that the primary and predominant purpose of the qualified opinions was to comply with statutory requirements. There is also no evidence of the second defendant acting in concert with other defendants, resulting in an agreement with the predominant purpose of injuring the plaintiff. On the contrary, the second defendant had acted independently and in a manner consistent with its statutory and contractual duties, in its treatment of the PSH debt in the auditors' reports.

A Plain And Obvious Case For Striking Out

[48] It is settled law that recourse to the summary procedure of striking out under O. 18 r. 19(1) of the ROC should only be allowed in plain and obvious cases (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36).

[49] With my finding that there is sufficient documentary evidence to show that the "amount due to directors" in the financial statements was qualified in a manner consistent with the requirements of the CA 2016 and to ensure the second defendant's compliance with the CA 2016, I find there to be no reasonable cause of action against the second defendant. It is therefore my finding that the plaintiff's action against the defendant is obviously unsustainable and that this is a fit and proper case for the court to strike out the plaintiff's claim against the second defendant.

Decision

[50] With the findings as set out, I allowed the striking out application, with costs.